

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2

LFI PYRAMID CONSULTING, INC.

Employer

and

Case No. 2-RC-22027

DISTRICT COUNCIL 37, AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein the Act, as amended, a hearing was held before Margit Reiner, a Hearing Officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding,<sup>1</sup> the undersigned finds that:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.<sup>2</sup>

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<sup>1</sup> The briefs, filed by Counsel for Petitioner and Counsel for the Employer, have been duly considered. At the hearing, the Employer declined to recognize Petitioner as the exclusive bargaining representative for the petitioned-for employees until such time as an appropriate bargaining unit is certified by the Board. The parties stipulated that there has been no history of collective bargaining.

<sup>2</sup> During the hearing, Hearing Officer Reiner allowed Petitioner, over the Employer's objection, to submit into evidence the Employer's 1998 quarterly combined withholding and wage reports. Petitioner argued that the exhibit was relevant to the inquiry of whether the petitioned-for employees were temporary. In its post-hearing brief, the Employer requests that this exhibit be stricken from the record because it lacks relevance. In support, the Employer argues that the starting point for this inquiry is November 30, 1998, when it entered into its latest contract with the New York City Administration for Children's Services. During a representation hearing, a hearing officer is instructed that when establishing a record the overwhelming considerations are relevance and completeness and that all relevant documents and records are to be received as evidence. See Representation Case-Handling Manual Sections 11216 and 11224. As the continuous nature of the employer-employee relationship is relevant to the inquiry of whether these employees are temporary, I find that Hearing Officer Reiner properly admitted the exhibit and, therefore, the Employer's request is denied.

2. The parties stipulated and I find that LFI Pyramid Consulting, Inc. (Employer or “LFI”), with an office and principal place of business located at 7 Dey Street in Manhattan, is a New York State corporation engaged in the business of providing computer consulting services. Annually, and at all material times herein, the Employer, in the course and conduct of its business operations, purchases and receives at its New York City facility goods and services valued in excess of \$50,000 from firms inside New York State, which firms in turn received goods and services directly from points located outside the State. Accordingly, based upon the stipulation of the parties, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. While the Employer initially stipulated to the labor organization status of District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (Petitioner or “D.C. 37, AFSCME”), after a short adjournment of the hearing, it subsequently withdrew that stipulation without objection based upon certain documentary evidence it had received. Petitioner, in its post-hearing brief, objects to the Employer’s withdrawal from the stipulation. It argues that since Board precedent precludes the Employer from withdrawing from its stipulation after the record is closed a similar rule should apply prior to the close of the hearing.<sup>3</sup>

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<sup>3</sup> In support of its contention that the Employer should be precluded from withdrawing its stipulation, Petitioner cites *Cruis Along Boats, Inc.*, 128 NLRB 1019, 1020 (1960) and *Stanley Aviation Corp.*, 112 NLRB 461, 463 (1955), wherein the Board discusses its well established policy of honoring stipulations made in the interest of expeditiously handling representation cases. However, both of these cases are factually distinguishable to the instant matter. Thus, in *Cruis Along Boats, Inc.*, supra at 1020-21, the Board held that the parties were bound to their stipulations since allowing them to withdraw their stipulations at a pre-election conference would “be permitting the Petitioner to play fast and loose with [its] administrative processes.” Likewise in *Stanley Aviation Corp.*, supra at 463, the Board held that the parties were bound to their stipulations because allowing them to withdraw their stipulations after an election had been conducted would “be contrary to good administrative practice to reopen the record at this postelection stage of the proceeding.” Unlike those cases, the hearing in the instant matter had not yet closed. While Petitioner argues that the record was ostensibly closed, the hearing, in fact, had only been adjourned so that documents it had requested from the Employer during the course of the hearing could be procured and reviewed. Thus, the hearing had not yet been closed by written order of the hearing officer.

While it would be inappropriate to permit the Employer to unilaterally withdraw from the stipulation at a time when the other side has no opportunity to respond or to submit evidence on the matter at issue, here Petitioner was afforded the opportunity to present evidence concerning its labor organization status. Although Petitioner declined the opportunity to present testimony on the issue of its labor organization status, it did submit two AFSCME resolutions concerning organizing and representing private sector employees. Based upon the record and consistent with Board precedent, I find that Petitioner is a labor organization within the meaning of the Act.

The Employer contends that the instant petition must be dismissed because Petitioner cannot and does not represent employees of private, for-profit employers, such as LFI, and because such employees do not participate in D.C. 37. In support of its arguments, the Employer submitted D.C. 37's constitution as well as AFSCME's constitution, specifically referencing several portions of both constitutions. As noted above, Petitioner submitted two AFSCME resolutions concerning organizing and representing private sector employees. The record evidence on this issue is therefore exclusively documentary.

D.C. 37's constitution sets out several objectives. Under Article XI, Section 4, the D.C. 37 constitution and its application is made subject to AFSCME's constitution, while Section 5 provides that the D.C. 37 constitution is to be liberally construed. The AFSCME constitution, Article II sets out as one of its objectives that of promoting the organization of workers in general and public employees in particular. That provision, while setting forth the basic parameters of membership does not specifically enumerate all the types of employees who may be eligible for AFSCME membership.

In addition to its constitution, during its 1998 convention, AFSCME adopted two resolutions submitted by its International Executive Board that have bearing on the issue of labor organization status. The first resolution entitled, “Cooperative Strategic Organizing Program,” provides, “We are under attack, simultaneously, on two fronts, the privatization movement and the ‘paycheck protection’ movement; both aimed at undermining the union’s ability to defend the membership . . .” In response, the Union resolved to create a program with the goal, *inter alia*, of organizing privatized public service workers. The second resolution entitled, “Fighting Contracting Out,” resolved that the Union “will redouble its efforts to fight contracting out on all fronts . . . through advocacy and negotiation at the bargaining table and other available forums” in response to “public agencies and private companies [competing] to determine who delivers public services.”

The applicable provision of Section 2(5) of the Act provides that a labor organization “means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” See *Alto Plastics Manufacturing Corp.*, 136 NLRB 850, 851-52 (1962). Thus, three requirements must be met to establish labor organization status: it is an organization or group of any kind; employees must participate in the organization; and the organization exists, at least in part, for dealing with employers concerning such matters as wages, hours or working conditions. The Board has held that these requirements are to be interpreted liberally. *South Nassau Communities Hospital*, 247 NLRB 527, 529-30 (1980). Specific

structural formalities are not prerequisites to labor organization status within the broad meaning given that phrase in Section 2(5). See *Yale University*, 184 NLRB 860 (1970); *Butler Manufacturing Co.*, 167 NLRB 308 (1967).

The Employer's contention that both the D.C. 37 and AFSCME constitutions restrict Petitioner from representing LFI employees thereby disqualifying it as a labor organization within the meaning of Section 2(5) is without merit. While the D.C. 37 constitution clearly demonstrates that New York City employees are the primary group of workers that Petitioner represents, D.C. 37, as a subordinate body of AFSCME, is required to support AFSCME's constitution and its causes. Contrary to the Employer's contention, the AFSCME constitution shows that Petitioner has the constitutional ability to represent a broad group of workers, whether they be public or private sector workers. Moreover, the document provides the flexibility necessary to represent those groups of workers who have looked to it for assistance in improving the terms and conditions of their employment.

The Employer's reliance on *United Truck and Bus Service Co.*, 257 NLRB 343 (1981) is misplaced as the membership provisions of both the D.C. 37 and AFSCME constitutions are not as restrictive as the membership provision at issue in that case. Thus, in *United Truck and Bus Service Co.*, the Board found that the union was not a labor organization because in order to be eligible for membership, the union required that a person "must be working at the calling within the territory of [that union]," and that the union's "calling" was synonymous with its stated craft jurisdiction, that of public employees. *Id.* at 344 In addition, the Board found that since the membership of the union was limited to persons employed by public employers, the union did not exist for

the purpose of dealing with employers as defined in the Act. *Id.* While the union in *United Truck and Bus Service Co.* prohibited private sector employees, there is nothing in either constitution here that prohibits private sector employees from becoming members. See, e.g., *Base Services, Inc.*, 296 NLRB 172, 176 (1989) (finding labor organization status despite constitutional language that may appear at first glance to prohibit membership of private sector employees). Moreover, as Petitioner's jurisdiction can always be enlarged by AFSCME, and its membership would not necessarily be limited to public employees, it would exist for the purpose of dealing with employers as defined by the Act.

Even assuming, *arguendo*, that both constitutions did prohibit membership by private, for-profit employees like those of LFI, the Board has long held that the constitution of a petitioning union need not encompass the types of employees sought to be represented in order for a union to qualify as a labor organization under the Act. *Mariah, Inc.*, 322 NLRB 586, 587 (1996). Rather, it is the Union's willingness to represent the employees, rather than its constitutional ability to represent employees that is controlling. *Id.*; see also *Big "N," Department Store No. 307*, 200 NLRB 935, 935 fn. 3 (1972); *Hazelton Laboratories, Inc.*, 136 NLRB 1609, 1609-10 fn. 2 (1962).<sup>4</sup> To the extent that the Employer argues that "participation in the organization" is based on membership, the Board has found that the mere act of signing authorization cards constitutes the required membership and that actual membership is not required. *AutoZone, Inc.*, 315 NLRB 115, 116 (1994), *enfd.* 83 F.3d 422 (6<sup>th</sup> Cir.), *cert. denied*

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<sup>4</sup> Although the Employer argues that Petitioner's willingness to admit LFI employees is eliminated by reference to appendices A and C of AFSCME's constitution, it is Petitioner's willingness to represent LFI that is controlling and Petitioner has demonstrated that willingness by getting authorization cards signed and the filing of the instant petition.

117 S. Ct. 359 (1996) (citing *Electrical Construction and Maintenance, Inc.*, 307 NLRB 1247, 1247 fn. 1 (1992)).

Finally, the Employer argues that the resolutions introduced by Petitioner underscore the impropriety of permitting D.C. 37 to represent LFI employees. While AFSCME may oppose the contracting out of jobs held by its traditional membership, it has expressed its willingness and that of its affiliates and local unions to organize privatized workers “whose employers jeopardize the standards [it’s] attained for public service work.” AFSCME’s opposition to contracting out does not vitiate its willingness to represent the petitioned-for employees. The Employer has failed to show that the adoption of a resolution against contracting out creates such a conflict of interest so as to disqualify Petitioner from representing the petitioned-for employees. See *Harbert International Services*, 299 NLRB 472, 481-82 (1990); *Universal Fuels, Inc.*, 270 NLRB 538, 540 (1984). Accordingly, based on all of the above, I find that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of employees of the Employer in the unit sought by Petitioner within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. As amended at the hearing,<sup>5</sup> the Petitioner seeks to represent a unit comprised of all full-time and regular part-time technical support liaisons (“TSLs”) and local area network (“LAN”) administrators employed by the Employer and working at all locations of the New York City Administration for Children’s Services (“ACS”) throughout

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<sup>5</sup> Petitioner originally sought to represent all employees designated as User Support Liaison, User Support Liaison Site Contacts or Team Leaders working at locations of the Administration for Children’s Services in the five boroughs of the City of New York. The unit includes all employees who perform computer troubleshooting problems with hardware and software and related work.

the five boroughs of New York City, excluding all guards, professionals and supervisors as defined by the Act.<sup>6</sup>

The Employer contends that the instant petition must be dismissed because the unit sought by Petitioner is comprised solely of temporary employees. Alternatively, the Employer argues that the LAN administrators are temporary employees, even if, *arguendo*, the TSLs are not, and that in any case the LAN administrator position must be excluded from the unit. The Employer also argues that if the petitioned-for unit is found to be an appropriate unit, that unit must exclude Pamela Bhajan and Patricia Goodridge as they are supervisors within the meaning of Section 2(11) of the Act. Contrary to the Employer, Petitioner argues that under the Act, the employees are not temporary and Bhajan and Goodridge are not supervisors. Finally, the Employer contends that if an election is directed, the election should be postponed until the initial group of LFI employees are let go so that a representative complement of the contracted workforce will vote on whether they desire representation.

Mark Mazer, Director of Network Services for ACS, testified that ACS is a New York City agency that was established in 1996-97 to insure the safety and well being of the children of New York City. The Employer provides computer-consulting services to ACS. Specifically, the Employer assists ACS with its Management Information Systems ("MIS") and Information Technology ("IT") needs.<sup>7</sup> The Employer's relationship with ACS originated in April of 1997. At that time, it was contracted for 15 days to assess what help the agency would need in order to maintain its computer system and how the

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<sup>6</sup> In the event that the petitioned-for unit is determined not to be an appropriate unit, Petitioner agreed to an election in whatever unit is determined appropriate.

<sup>7</sup> Approximately 60 ACS employees holding computer titles work in the Agency's MIS department and belong to Local 2627 of D.C. 37, AFSCME.

users of that system, including city case workers, clericals, supervisors and administrators, should ultimately be trained. At that time, the Employer provided ACS with five employees. After the conclusion of that contract, the Employer continued to provide services to ACS, along with two other companies, under a subcontract it had with IBM, which, in turn, had a contract with the New York State Department of Social Services. The subcontracting relationship ended as of November 27, 1998. Starting on November 30, 1998, the Employer entered into a three-year, competitively bid contract with ACS to provide personnel, including LAN administrators and technical support liaisons, also known as TSLs, at ACS' 90 locations, 50 main sites and 40 small satellite sites, spread throughout the five boroughs of New York City.<sup>8</sup> Fidel, the Employer's President, testified that the Employer's largest client was ACS and that other than the employees assigned to ACS and himself, it employed only two other consultants.

According to Mazer, the Employer is now providing ACS with five LAN administrators until those positions are permanently filled by qualified ACS employees. LAN administrators are responsible for a higher level of troubleshooting than TSLs and fill critical positions. The Employer's LAN administrators work 40 hours a week or more, while ACS LAN administrators work only 35 hours a week. As of the hearing, two of the five LAN administrators had worked at ACS for about two months, while the remaining three had worked there for only about a month. All five LAN administrators are based at the agency's 150 William Street facility; however, they are dispatched to various ACS facilities as needed.<sup>9</sup> The Employer has been providing ACS with LAN administrators

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<sup>8</sup> The contract/bid was offered into evidence by the Employer.

<sup>9</sup> According to Mazer, ACS has its own LAN administrative department with 25 positions in it. Five of those positions are held by the Employer's employees, ten are held by ACS computer specialists and associates who are members of Local 2627 of D.C. 37, AFSCME, and the remaining positions are vacant.

for approximately a year and a half. The first of these employees worked at the ACS facility for about four months. Mazer testified that when ACS received additional hiring authority in the past, it has requested that the Employer send it LAN administrators who have had experience with the agency. He explained however that those people were not generally available when ACS needed them. Mazer stated that ACS would permanently fill the five LAN administrator positions soon, but that it usually “takes a couple of months for us to bring somebody on board.” According to Mazer, as soon as the paperwork, which was submitted about a month prior to the hearing, went through, the Employer’s five LAN administrators would be terminated. He explained that while it usually takes one to two months for the paperwork to be processed, ACS has no control over the process.

With respect to the TSLs, Mazer explained that they are responsible for training a user community of approximately 7,000 people at its 90 locations on how to use office automation products like Microsoft Word, Microsoft Excel, Exchange and Access. TSLs also help troubleshoot hardware problems at the various ACS locations, manage services, “follow up on back-ups, restore procedures and [perform] some LAN administrative duties.” According to Fidel, LFI has no control over where its employees are assigned. TSLs must have two years of personal computer experience, one year of experience in a Windows NT environment and two years of experience using Microsoft Office. The Employer’s TSLs work 40 hours a week as opposed to ACS employees who work 35 hours a week. Mazer testified that at the time of hearing, the Employer had 80 TSLs working at ACS, although the number of the Employer’s employees fluctuated from as high as 85 to a low of 65. Since July of 1998, he estimated that the

number had consistently been between 70 and 90 employees. Notwithstanding, he said the number of TSLs varied weekly.<sup>10</sup>

Mazer testified that ACS expected a drastic reduction of the Employer's TSL personnel within the next three to four months, with possible elimination of all its employees within 9 to 12 months notwithstanding the three-year contract. Mazer explained that since its computer connection and implementation program was entering its third year, and its users had already received several years of training, he anticipated that the Employer's services would no longer be required given the user's growing level of expertise. He also stated that ACS anticipated having to hire "regular" or permanent employees to take over the troubleshooting functions now provided by the Employer's TSLs. When pressed about how many TSLs might be let go within the next three to four months, he responded anywhere from 20 to 40 percent.

Mazer explained that ACS entered into the three-year contract with the Employer in order to lock-in today's prices for as long as possible.<sup>11</sup> Fidel stated that despite the three-year contract, he had no idea how long his employees would continue to provide technical support services to ACS and that "it might be for several months, it might be for six months." He testified that when his company entered into the new contract with ACS, he conveyed to eight TSLs, who also serve as team leaders, that the company was now working with ACS under a new contract.<sup>12</sup> He said that while he told them that the contract was for a three-year duration, he also explained to them that it was a consulting assignment and that they would be assigned to ACS as long as their services

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<sup>10</sup> According to Fidel, at the time of the hearing he had a total of 110 employees working at ACS.

<sup>11</sup> The contract provides for a variety of early cancellation options.

<sup>12</sup> The record is unclear whether he informed all employees, i.e., LAN administrators and TSLs, or just the team leaders.

were required and that at any point they could be let go on 24 hours notice. He also stated that prior to entering into the most recent contract with ACS, he also informed employees that they could be terminated on 24 hours notice.

Mazer explained that in past, a TSL supplied by the Employer would leave ACS if his or her services were no longer required at a particular site and ACS had no other assignment for them at one of its other sites. Fidel noted that since his company began dealing with ACS back in 1997, approximately 30 employees have been removed from employment. Of the 30 employees let go, 15 were let go for performance-related problems, five quit because they did not want to be reassigned and 10 were let go for lack of work. According to Fidel, 25 employees had been with his company for more than a year and 15 employees had been working at ACS as TSLs since the inception by ACS of its computer program back in 1997. According to the Employer's 1998 quarterly combined withholding and wage reports, more than 30 employees have been with the Employer for the first three quarters of 1998. Fidel also testified that he promised new hires that that they would be given a raise if they remained with his company for more than a year and that he was investigating the possibility of providing his employees with health insurance benefits. The Employer's employees receive no benefits such as sick leave or vacation. Rather, they are paid on an hourly basis for every hour they work.

According to Fidel, Pamela Bhajan and Patricia Goodridge are team leaders/supervisors as well as TSLs. Both work at the city agency's facility located at 150 William Street. Neither has a private office. Bhajan's duties consist of interviewing people and informing Fidel who should be hired and brought to work at ACS. While Bhajan has worked for the Employer for approximately one year, she first began

interviewing job applicants five months ago. Goodridge has the same authority as Bhajan. She also began interviewing job applicants five months ago. Fidel explained that Bhajan is the primary contact for applicant interviews and that Goodridge is the secondary contact; however, they usually interview applicants together. Once Bhajan interviews candidates, during which she “techs them out” to test their technical knowledge and evaluates their attitude, she reports her conclusions to Fidel by telephone. Bhajan and Goodridge typically recommend applicants to Fidel every two or three weeks. The other 6 team leaders/TSLs do not make hiring recommendations. According to Fidel, he rejects Bhajan’s recommendations only when the applicant does not pass the clearance process required by ACS, the applicant is unavailable or his or her salary demands are unreasonable or if Goodridge and Bhajan disagree. He does not interview applicants at all and he only speaks to them about salary and work schedules after a decision has been made to offer them employment. He testified that the week prior to the conclusion of the hearing, Bhajan, after interviewing about 10 applicants, hired at least three of them on her own without seeking his approval. In addition, two weeks before that she also hired another applicant.

Fidel testified that Bhajan also collects time cards and compiles time sheets from them, which she then transmits to ACS and Fidel. According to Fidel, Bhajan supervises 10 TSLs by relating to them instructions she receives from ACS. Goodridge also supervises 10 TSLs. He acknowledged that Bhajan serves as a conduit between ACS and the TSLs. He stated that both Bhajan and Goodridge discipline employees approximately every month to two months, but he did not recall any specific instances. He explained that they only discipline employees at the direction of ACS and that this

discipline consists merely of talking to the employees. They do not have input into salary decisions, they are not authorized to grant time off to employees and they are not authorized to terminate employees. He said that he generally talks to each of them about the TSLs' work performances once a month. Bhajan and Goodridge, as team leaders, are paid more than other TSLs.

As noted above, the Employer contends that the instant petition must be dismissed because the unit sought by Petitioner is comprised solely of temporary employees. Alternatively, the Employer argues that the LAN administrators are temporary employees, even if, *arguendo*, the TSLs are not, and that they should be excluded from any unit.

Under Section 2(3) of the Act, the term employee

shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

Generally, employees are eligible to vote in a representation election if they are employed in the bargaining unit during the eligibility period and are still employed on the date of the election. *National Posters, Inc.*, 282 NLRB 997, 1002 (1987), *enfd.* 885 F.2d 175 (4<sup>th</sup> Cir. 1989). One exception to this general rule is in the case of temporary employees. See *Pen Mar Packaging Corp.*, 261 NLRB 874, 874 (1974) (holding that a temporary employee is ineligible to be included in the bargaining unit and that an employee's eligibility status is determined by his/her status as of the payroll eligibility date). In determining whether a temporary employee should be included in a bargaining

unit, the Board has stated that the “date certain” test does not require the party contesting an employee’s eligibility as a temporary employee to prove the employee’s tenure was certain to expire on an exact calendar date.

In *Pen Mar Packaging Corp.*, supra, 261 NLRB at 874, the Board found that an individual was a temporary employee as of the determinative eligibility date given that he was informed that he was only being hired for the summer with no expectancy of permanent employment. The Board concluded that the prospect of the employee’s termination at summer’s end was sufficiently finite to dispel any reasonable expectation of permanent employment beyond the summer. *Id.* In fact, the Board noted that despite the fact that the employee worked beyond the summer’s end, he still considered himself to be a temporary employee. Although the employee worked two additional months and may have been considered for a permanent position, these factors are irrelevant since such events occurred after the determinative eligibility date. *Id.*

In *Caribbean Communications Corp.*, supra, 309 NLRB at 713, an employee was hired as a file clerk to complete a filing backlog project. When she was hired, she was specifically told she would be kept on until the filing backlog was completed. While the original estimate of the project was three to four months, the project actually took over six months to complete. Seven days after the election, she was told her job would end. The hearing officer found that this employee was eligible to vote in an election because there was no certain termination date until after the election. In reversing, the Board stated, “[the date certain test] does not require a party contesting an employee’s eligibility to prove that the employee’s tenure was certain to expire on an exact date. It is only necessary to prove that the prospect of termination was sufficiently finite on the

eligibility date to dispel a reasonable contemplation of reasonable employment.” *Id.* Thus, the Board concluded that although the project lasted two to three months longer than estimated, its ultimate completion under the date certain test was a sufficiently certain event as of the determinative eligibility date. Furthermore, the Board found that the employee had no reasonable expectation of employment beyond the completion of the project despite the fact that her evaluation identified areas for improvement if she wanted to be considered for permanent employment. *Id.* See also *United States Aluminum Corp.*, 305 NLRB 719, 719 (1991).

In a recent case, *Macy’s East*, 327 NLRB No. 22 (1998), the Board found that eight costume shop employees were temporary employees with a finite termination date rather than seasonal employees who had a reasonable expectation of future employment. The Board explained that while it assesses seasonal employees’ reasonable expectation of future employment when determining their voting eligibility, the critical inquiry with respect to temporary employees is a certain termination date. In finding that these employees had a finite termination date, the Board noted that the Employer’s costume shop only operates for short period of time each year, that these employees were told that their employment would end after the clean-up process was over and that they were issued temporary identification cards with a finite termination date. *Id.* at \*2. Notwithstanding, that these employees were not seasonal employees, the Board went on to look at their reasonable expectation of employment, finding that the Employer did not have a policy of recalling or giving preference in future years to former employees and that the employees at issue not been hired in previous years.

Based on the foregoing, I find that the Employer's five LAN administrators are temporary employees because their prospect of termination is sufficiently finite to dispel a reasonable contemplation of future employment. The record establishes that at the time of the hearing, ACS had already selected personnel to permanently replace these employees. In fact, the paperwork had already been sent to the appropriate city agencies for approval approximately a month to a month and half prior to the hearing. Mazer testified that while he had no control over the timing of the approval process, it was his experience that such approvals usually took about two months. While no definite termination date has been set for these individuals, the end of these five employees' tenure at ACS, and thus with the Employer, is imminent and sufficiently finite such that it is unlikely that they will still be working on the eligibility and election dates. I conclude therefore that the Employer's five LAN administrators are ineligible to vote and should be excluded from the petitioned-for unit.

Unlike the LAN administrators, I find that the Employer's TSL personnel are eligible to vote. Thus, the TSLs are eligible to vote because the prospect of their termination is not sufficiently finite. Bearing in mind that the Employer does not have to prove that the tenure of these employees is set to expire on an exact date, the Employer is nevertheless required to show that the prospect of termination is sufficiently finite so as to dispel a reasonable expectation of employment. See *Caribbean Communications Corp.*, supra, 309 NLRB at 713. I find that the Employer has not met this standard.

In support of its contention that the TSLs are temporary employees and therefore ineligible to vote, the Employer states that the TSLs were hired for one job only, a

project of set duration, and that it anticipates that 20 to 40 percent of those employees may be let go within three to four months and that the remaining employees may possibly be let go within nine months to a year. The Employer further contends that the TSLs have no expectation of continued employment as they were informed that they were hired for a consulting assignment, that they worked at the pleasure of its client, ACS, and that they could be let go with 24 hours notice.

Notwithstanding the Employer's contentions, the record evidence establishes that no definite termination date has been established. These employees were merely told that they served at the pleasure of ACS and that they could be let go at anytime. Thus, the instant case is distinguishable from *Pen Mar* and *Caribbean Communication Corp.*, wherein the Board found that a sufficient date certain had been set because the terminations were tied to the completion of a special task or project. Here the employees were never told that their job ended upon the completion of a special project. While the Employer sought to depict its most recent contract with ACS as a project, the record shows otherwise. Thus, the record reveals that the Employer has had an ongoing relationship with ACS since 1997 when that agency was created and its computer system was formulated. The record further reveals that the Employer's TSLs have worked at ACS since that time. Fifteen TSLs have been at ACS since 1997 and more than 25 have been there at least a year, with the likelihood that some may remain until 2001.

In addition, testimony that ACS anticipates that between 20 to 40 percent of the TSLs will be let go within three to four months of the representation hearing and that the remaining TSLs will be let go within nine months to a year after that was

unsubstantiated and insufficient therefore to find that these employees will be laid off on a date certain. It is noted that the Employer only a few weeks before the representation hearing entered into a three-year contract with ACS to provide computer consulting services until 2001. While ACS representative Mazer testified that it only entered into that three-year contract to lock in today's prices, he acknowledged that the only basis he had for anticipating that the Employer's TSLs would be let go in the future was that the ACS computer user community had been receiving training for a few years now. He also acknowledged that at this time there were no ACS employees currently on staff who could perform the TSLs' troubleshooting functions.

Despite the fact that the Employer may have told these employees that they worked at the pleasure of its client ACS and that they could be let go with 24 hours notice, the Employer nevertheless signed a three-year contract to provide computer consulting services to ACS. Moreover, Fidel by his very actions demonstrated that an on-going employment relationship was contemplated. Thus, he told employees that he would give them a raise at the end of their one-year anniversary and that he was exploring the possibility of providing them with health insurance benefits. Accordingly, I find that the Employer's TSLs are not temporary employees and that they eligible to vote in the unit found appropriate below.

Section 2(11) defines a supervisor as follows:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them or to adjust their grievances or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that Section 2(11) of the Act must be read in the disjunctive and that an individual therefore need only possess one of these powers for there to be a finding that such status exists. *Concourse Village, Inc.*, 276 NLRB 12, 13 (1985). However, the grant of authority must encompass the use of independent judgment on behalf of management. *Hydro Conduit Corp.*, 254 NLRB 433, 441 (1981). The party seeking to exclude an individual as a supervisor bears the burden of establishing that such status, in fact, exists. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393 fn. 7 (1989). Mindful that a finding of a supervisory status removes an individual from the protection of the Act, the Board avoids attaching to Section 2(11) too broad a construction. *Adco Electric, Inc.*, 307 NLRB 1113, 1120 (1992), *enfd.* 6 F.3d 1110 (5<sup>th</sup> Cir. 1993). The Board has noted that, in enacting Section 2(11) of the Act, Congress stressed that only persons with “genuine management prerogatives” should be considered supervisors, as opposed to “straw bosses, leadmen, . . . and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985) (citing Senate Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)), *aff’d* in relevant part 794 F.2d 527 (9<sup>th</sup> Cir. 1986). Thus, “whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Here the record establishes that the Employer has met its burden of establishing that Bhajan and Goodridge are supervisors within the meaning of Section 2(11) of the Act.

In support of its argument that Bhajan and Goodridge are statutory supervisors, the Employer contends that they both currently interview job applicants, that they both

effectively recommend that certain applicants be hired and that Bhajan, in fact, makes hiring decisions herself. In addition, the Employer argues that these two individuals are supervisors because they implement discipline and assignments and directly supervise approximately 10 TSLs each. "It is well established that supervisory status is established by actual possession of authority, however infrequently exercised and that paper credentials unaccompanied by actual authority will not confer supervisory status. Thus, supervisory status turns on the actual duties of the individual rather than his or her formal title or classification. *Adco Electric, Inc.*, supra, 307 NLRB at 1120; accord *Westinghouse Broadcasting Co., (WBZ-TV)*, 215 NLRB 123, 125 (1974) (quoting *NLRB v. Southern Bleachery and Print Works, Inc.*, 257 F.2d 235, 239 (4<sup>th</sup> Cir. 1958), cert. denied 359 U.S. 911 (1959)).

While the Employer points out that Bhajan and Goodridge perform duties such as assigning work to TSLs, these assignments are not dispositive of supervisory status. The Board has long held that the performance of some supervisory task in a routine or sporadic manner will not make a rank-and-file employee a supervisor. *Amperage Electric, Inc.*, 301 NLRB 5, 13 (1991), enfd. 956 F.2d 269 (6<sup>th</sup> Cir. 1992). To the extent that work assignments are based on equalizing employees' workloads, *Ohio Masonic Home, Inc.*, supra, 295 NLRB at 395, or on an appraisal of skills when the differences in skills are well known, they are routine assignments not based on independent judgment. *Clark Machine Corp.*, 308 NLRB 555, 555-56 (1992). Based on Fidel's testimony, Bhajan and Goodridge merely relate instructions they receive from ACS managers to the TSLs. There is no evidence that they exercise independent judgment when

assigning work. Moreover, collecting time cards and compiling time sheets is also routine and requires no independent judgment.

Nor does the record evidence support a finding that Bhajan and Goodridge have the authority to discipline or terminate or for that manner that they effectively recommend such actions. According to Fidel, both Bhajan and Goodridge discipline employees only at the direction of ACS. As noted above, such discipline, if it can be called discipline, consists merely of talking to the employees. Fidel further testified that they do not have authority to terminate employees.

Nonetheless, the record evidence supports that Bhajan and Goodridge interview job applicants and effectively hire or recommend them for hiring. Both Bhajan and Goodridge have been interviewing applicants for five months and they typically recommend prospective employees to Fidel every couple of weeks. It is well established that the authority to effectively recommend action within the meaning of Section 2(11) of the Act generally requires that the recommended action be taken with no independent action by superiors, not simply that the recommendation is ultimately followed. *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), enforcement denied by 712 F.2d 40 (2d Cir. 1983). The record establishes that Fidel does not interview candidates himself and that the applicants Bhajan and Goodridge recommend are generally hired unless they do not pass clearance by ACS, they are not available, their salary demands cannot be met or Bhajan or Goodridge do not agree. In addition, the record establishes that Bhajan has, in fact, hired candidates without consulting Fidel.<sup>13</sup>

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<sup>13</sup> Finally, the Employer contends, in its post-hearing brief, that Bhajan and Goodridge possess certain secondary indicia of supervisory status, including, but not limited to the assertion that it considers them to be supervisors and that they receive greater pay than other employees encompassed by the petition in this matter. It is well settled that secondary indicia are not dispositive in the absence of evidence indicating the existence of any one of the primary indicia of such status. *North Jersey Newspapers Co.*, 322 NLRB 394, 395 (1996). While the Employer may consider

Based on a consideration of all the factors set forth above, and the well established precedent that possession of only one of the indicia is sufficient to confer supervisory status, I find that Bhajan and Goodridge are supervisors within the meaning of Section 2(11) of the Act given that they have effectively recommended hirings or have, in fact, hired employees, and therefore they will not be included as eligible voters in the unit of employees found appropriate below.

Finally, the Employer contends that the election should not be conducted for three to four months until the initial group of the Employer's TSLs are let go. The Board has held that conducting an election would not effectuate the purposes of the Act if certain circumstances existed which would affect the viability of a bargaining unit. Thus, the Board has held that an election would not be directed at a time when a permanent layoff is imminent and certain. *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992) (finding that the Employer's decision to subcontract out work constituted a certain and imminent decision in that letters of intent had been executed with the subcontractors and the employees had received notice of permanent layoff).

In support of its argument, the Employer cites *Douglas Motors Corp.*, 128 NLRB 307 (1960). In that case, the Board held that it would be inconsistent with the Act to direct an election, reasoning that in addition to "the contraction in the size of the work force," the number of job classifications was going to be reduced from 16 to one, but more importantly that the nature of the Employer's business operation was going to fundamentally change with sufficient definiteness. *Id.* at 308-09. The Employer's also cites as support *Davey McKee Corp.*, 308 NLRB 839 (1992) (holding that an election

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Bhajan and Goodridge to be supervisors, formal titles or classifications are not controlling as noted above. *Adco Electric, Inc.*, supra, 307 NLRB at 1120. Moreover, higher compensation is not dispositive of supervisory status. See

should not be directed because a project was set to end in 29 days) and *Larson Plywood Co.*, 223 NLRB 1161 (1976) (holding that an election should not be directed as the Board of Directors directed the Employer to liquidate the business within 90 days, a date certain). The Employer's reliance on these cases is misplaced.

In determining whether the continued processing of a petition is warranted, it is incumbent upon the Board to ascertain whether facts support a conclusion that the anticipated event is considered both definite and imminent. Here the Employer offered no documentary evidence in support of its position that ACS will actually let the TSLs go in three to four months, let alone nine to twelve months. Rather, it is under contract to provide computer consulting services until at least 2001 and therefore any possibility that ACS will let the Employer's TSLs go is merely speculative. Moreover, when ACS representative Mazer was pressed about how many TSLs might possibly be let go in three to four months, he was only able to offer a vague estimate of between 20 to 20 percent. At this point, there is not a sufficient basis upon which to deprive these employees of their guaranteed rights to decide whether they wish to be represented for purposes of collective bargaining which may have particular relevance at the present time when there is no certain and imminent date as to when their services will no longer be required. See *NLRB v. New England Lithographic Co.*, *supra*, 589 F.2d at 34 ("An employee who works during the payroll period and whose affiliation with the Employer is of an unspecified duration is naturally concerned with the terms and conditions of his/her employment.")

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*Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993).

In view of the considerations described above, I find that the following constitutes a unit that is appropriate for the purposes of collective-bargaining under Section 9(b) of the Act:

All full-time and regular part-time technical support liaisons employed by the Employer to provide computer consulting services for the New York City Administration for Children's Services at its various sites located throughout the five boroughs of New York City, excluding all employees employed as local area network (LAN) administrators and guards, professionals and supervisors as defined by the Act.

#### Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.<sup>14</sup> Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced

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<sup>14</sup> Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the

more than 12 months before the election date and who have been permanently replaced.<sup>15</sup> Those eligible shall vote on whether or not they desire to be represented for collective bargaining purposes by District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO.<sup>16</sup>

Dated at New York, New York  
January 27, 1999

(s) \_\_\_\_\_  
Daniel Silverman  
Regional Director, Region 2  
National Labor Relations Board  
26 Federal Plaza, Rm. 3614  
New York, New York 10278

Code: 339-7525-6700  
362-6718  
177-8520  
347-8020-6000

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Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

<sup>15</sup> In order to assure that all eligible voters may have an opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1969); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, three (3) copies of an election eligibility list, containing all the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **February 3, 1999**. No extension of time to file this list may be granted, nor shall the filing of the request for review operate to stay the filing of such a list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election when ever proper objections are filed.

<sup>16</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by **February 10, 1999**.